No. 20537

In the

United States Court of Appeals

For the Ninth Circuit

ALBERT J. WILD and AIR CONDITIONING SUPPLY CO., INC.,
Appellants,

vs.

UNITED STATES OF AMERICA, BENNETT Y. BREWER, and VALLEY NATIONAL BANK,
Appellees.

Brief of Appellants

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JURISDICTIONAL STATEMENT

The proceedings below were commenced by the filing of a "petition" by the United States and Bennett Y. Brewer, Special Agent (hereinafter referred to as "appellees"), purportedly under the jurisdictional grant of Section 7604(a) of the Internal Revenue Code of 1954, 26 U.S.C. § 7604(a) (1958 ed.), seeking to enforce an International Revenue summons issued by Brewer to the Valley National Bank for delivery of "[l]oan records and credit records pertaining to loans made" to appellants, including "financial statements", purportedly under the authority of Section 7602

of the Internal Revenue Code of 1954. (R. I-1.)* An order to show cause was obtained directing the Bank to show cause why it should not be compelled to obey the summons. (R. I-8.) Thereupon, appellants intervened in the proceeding (R. I-36), a response by the Bank (R. I-25) and an answer by appellants (R. I-33.) were filed and a hearing was held on said order to show cause. An order granting the petition and setting forth the opinion of the District Court was thereafter filed (R. I-88), from which appellants appealed. The jurisdiction of this Court is based on 28 U.S.C. § 1291. The Bank not having perfected an appeal, the Record herein shows the Bank as a nominal appellee.

STATEMENT OF THE CASE

The petition below alleged that Brewer had been conducting an investigation of the income tax returns of appellants "for the purpose of ascertaining the correctness of the income tax returns" filed by intervenors for the years 1960 to 1962 (paragraph IV, R. I-1) and that the Bank had certain records "which would have a direct relation to the correctness of the income tax returns" (paragraph V, R. I-2). An affidavit by Brewer submitted in support of the petition at the time of its filing alleged that he was conducting the investigation referred to as "a Special Agent of the Intelligence Division, Internal Revenue Service" and that, based upon his investigation, "he has determined that it is necessary to obtain certain financial records belonging to the Valley National Bank, in order to ascer-

*The transcript of record in this case is in two volumes, Volume I being the court file and Volume II the transcript of testimony at the hearing before the District Court. For simplicity, citations to the record ("R.") will be to the appropriate volume by Roman numerals ("I" or "II") and to the appropriate page of the volume cited by Arabic numerals.

tain the correctness of the said returns." (R. I-4.) The documents sought by Brewer were, as noted, certain "[l]oan records and credit records pertaining to loans made" to appellants, including "financial statements". (R. I-6.) The response of the Bank and the answer of appellants denied the allegations referred to without qualification and appellants' answer further averred that Brewer's investigation pertained solely to enforcement of criminal statutes and was for the purpose of prosecuting or preparing to prosecute a criminal case against appellants for an alleged violation of the criminal income tax laws. (See the Record I-25 *et seq.* and 33 *et seq.*, particularly page 33a*.) The Bank's response also affirmatively alleged that certain of the documents sought by Brewer were "totally immaterial" to his alleged investigation. (R. I-27.)

The two allegations of the petition referred to having been particularly placed in issue (with specific attention called thereto in the opening statements prior to the taking of testimony, with special reference to Treas. Reg. 1118.6 describing the function of the Intelligence Division (see R. II-23-40)), petitioners elected to offer *no* testimony concerning the allegation in the petition that Brewer's investigation was "for the purpose of ascertaining the correctness" of appellants' returns (Brewer's entire testimony is encompassed in R. II-47-53)† and, as to the appropriate-

*The Record fails to number the page following page 33, which is therefore referred to herein as page 33a.

†The only testimony which pertained to Brewer's function is his preliminary testimony that his function as a "Special Agent of the Intelligence Division" was "[t]o investigate alleged frauds against the Revenue" and (by affirmative responses to leading statements of petitioners' counsel) that he had been assigned to investigate the tax liability of appellants and had, during the course of his investigation, issued the summons sought to be enforced.

Such testimony, of course, was entirely consistent with appellants' position that Brewer's investigation was *not* "for the purpose

ness of the summons, to offer only the testimony of Brewer that he had noticed a discrepancy between the liability control sheet of the Bank showing six or seven loans to Air Conditioning Supply Co. totaling approximately $75,000 and the books of Air Conditioning Supply Co. totaling $6,000 (R. II-50-53).

Preliminary to the hearing above referred to, appellants also objected to the conduct of the proceeding instituted by petition and order to show cause rather than by the filing of a complaint in accordance with the Federal Rules of Civil Procedure. (R. II-40-42.)

THE QUESTIONS PRESENTED

The questions presented on this appeal, then, are as follows:

(1) Whether the evidence presented in support of the petition was sufficient to warrant enforcement of the summons issued by Brewer, referring specifically to

(a) The allegation of the petition that Brewer's investigation was "for the purpose of ascertaining the correctness" of appellants' income tax returns;

(b) The allegation of the petition that the records sought "would have a direct relation to the correctness" of appellants' returns; and

(c) The inferential allegation in Brewer's affidavit that the records sought were required by him "in order to ascertain the correctness" of appellants' returns?

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of ascertaining the correctness of appellants' returns" but was instead related solely to the enforcement of criminal income tax statutes (the existence of some "tax liability" regardless of the amount, being an element of criminal income tax liability).

(2) If so, whether enforcement of the summons in the circumstances presented would involve a violation of the Fifth and Fourth Amendments to the Constitution of the United States?

(3) Whether the "petition" below should have been dismissed in any event as procedurally improper under the Federal Rules?

SPECIFICATION OF ERRORS

A specification of the errors of the District Court relied upon in connection with this appeal is as follows:

(1) The District Court erred in holding, inferentially, that appellees had proven sufficiently that Brewer's investigation was "for the purpose of ascertaining the correctness" of appellants' income tax returns and in failing to find that, to the contrary, such investigation was not for such purpose but instead was solely to assist appellees with respect to the enforcement of criminal statutes.

(a) The District Court erred in holding that, since there was a possibility that a criminal prosecution might not ensue, appellants investigatory purpose was proper.

(2) The District Court erred in holding, inferentially, that appellees had proven sufficiently that the records sought "would have a direct relation to the correctness" of appellants' income tax returns and in failing to find that, to the contrary, such records would not have any relationship to the correctness of appellants' income tax returns.

(a) The District Court erred in holding that, since the records sought "relate to financial transactions of the taxpayer being investigated," they thereby

"would have a direct relation to the correctness" of appellants' income tax returns. (R. I-89.)

(3) The District Court erred in holding, inferentially, that appellees had proven sufficiently that the records sought were required in order to ascertain the correctness of appellants' returns and in failing to find that, to the contrary, such records were not so required because the information sought therefrom was already in Brewer's possession.

(a) The District Court erred in holding that "there has been no evidence presented indicating that all the records and information sought belonging to the Bank are 'already within the Commissioner's possession' " (R. I-89).

(b) The District Court erred in holding, inferentially, that appellants had the burden of presenting such evidence in the circumstances presented.

(4) The District Court erred generally in holding that "petitioner has presented a prima facie case of relevancy and legitimacy of purpose, pursuant to the mandate of *United States v. Powell,* 379 U.S. 48, 85 S. Ct. 248, 255 (1964)."

(5) The District Court erred generally in holding that, in light of the foregoing and on the basis of the record presented, the summons issued by Brewer was authorized by Section 7602 of the Internal Revenue Code.

(6) The District Court erred in failing to dismiss the "petition" below as improper under the Federal Rules of Civil Procedure or in failing otherwise to accord appellants the benefit of the Federal Rules in treating appellees' "petition" as a "complaint".

SUMMARY OF ARGUMENT

Section 7602 of the Internal Revenue Code authorizes the Secretary of the Treasury or his delegate to issue a summons "[f]or the purpose of ascertaining the correctness of any return" and for certain other purposes (not here in issue under the pleadings) but *not* for any purpose at large and specifically not for criminal investigation, *i.e.*, ascertaining whether or not a crime has been committed. Section 7604 of the Code authorizes the enforcement of a summons properly issued only upon a showing that the purpose of the investigation is authorized and that compulsory production is otherwise appropriate—*i.e.*, that the material sought is relevant to a permissible investigation and is practically required (*i.e.*, that the information sought is not already available).

The showing made by appellees in this case was deficient by any meaningful standard, in effect requesting the judiciary to act as a rubber stamp enforcing the will of the person issuing the summons merely upon his assertion, without more, of the matters referred to. Indeed, the published regulation of the Internal Revenue Service describing the extent and limits of the duties of the Intelligence Division by which Special Agent Brewer is employed makes it clear that his function is solely to

> "enforce the criminal statutes applicable to income . . . tax laws . . . by developing information concerning alleged criminal violations thereof, evaluating allegations and indications of such violations to determine investigations to be undertaken, investigating suspected criminal violations of such law, [and] recommending prosecution when warranted,"

and the carefully guarded evidence only confirms his concern solely with enforcement of criminal statutes. Similarly,

appellees' description of the reason why the summoned records were sought reveals on its face a lack of relevancy to the correctness of appellants' returns, loans by the Bank to appellants having no relationship to appellants' income. Moreover, the testimony offered by appellees reveals on its face that the information sought has already been ascertained by Special Agent Brewer from other records of the Bank.

If Sections 7602 and 7604 of the Code are read so as to permit enforcement of the summons upon the record in this case, a serious Constitutional issue would be raised in view of "the primary and nearly exclusive role of the Grand Jury as the agency of compulsory disclosure" required by the Fifth Amendment and the related policy of the Fourth Amendment as to the requirements pertaining to search warrants.

In any event, the procedure followed by the government in this case, directly contrary to and consciously violative of the direction of the Supreme Court in the recent case of *United States v. Powell,* 379 U.S. 48, 85 S. Ct. 248, 255, n. 8 (1964), was so deficient in depriving appellants of the benefit of the Federal Rules and depriving the court of the benefits of a full hearing following compliance with the Federal Rules that the petition should have been dismissed for such procedural defect.

ARGUMENT

I. Enforcement of the Summons Was Not, Upon the Record in This Case, Authorized by the Statute or Judicially Warranted.

Section 7602 of the Internal Revenue Code, 26 U.S.C., § 7602, provides as follows:

> "*For the purpose of ascertaining the correctness of any return,* making a return where none has been made, determining the liability of any person for any

internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized

(1) to examine any books, papers, records, or other data *which may be relevant or material to such inquiry;*

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, *as may be relevant or material to such inquiry;* and"

"(3) To take such testimony of the person concerned, under oath, *as may be relevant or material to such inquiry.*" [Emphasis supplied.]

The bare minimum of proof that a delegate of the Secretary is required to produce to qualify for enforcement of a purported Section 7602 summons under Section 7604 has only recently been stated in the opinion of the Supreme Court in *United States v. Powell,* 379 U.S. 48, 85 S. Ct. 248, 255, (1964) as follows:

"He [the Commissioner] must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed—in particular, that the 'Secretary or his delegate' after investigation, has determined the further examination to be

necessary and has notified the taxpayer in writing to that effect."*

More than that, the Court was quick to emphasize that its recitation of the bare minimum of what the government was required to show could not be read as a license to conduct a "pro forma" hearing or to use the District Courts as rubber stamps. Immediately following the portion of the opinion above quoted, the Court pointed out that:

> "This does not make meaningless the adversary hearing to which the taxpayer is entitled before enforcement is ordered. At the hearing he 'may challenge the summons on any appropriate ground,' Reisman v. Caplin, 375 U.S. 440, at 449, 84 S. Ct. at 513. Nor does our

*The decision was required to settle the conflict which had developed among the circuit courts as to whether or not the government was required to show not only relevancy and materiality of its investigatory object but, more than that, "probable cause" where the taxpayer invoked the protection of Section 7605(b) of the Code prohibiting "unnecessary examination of investigations" [see and compare the circuit court decisions cited in n. 8 of the Court's opinion] and held that, in light of the legislative history of Section 7605(b), it was not necessary for the Commissioner to meet the standard of probable cause where, to assess liability, he required information not already in his possession. Whether the Court would rule similarly where the summons, although nominally an administrative summons, was for the purpose of aiding in preparation for a criminal proceeding, however, is still subject to doubt in view of the requirements of the Fourth Amendment. *Cf. Boyd v. United States*, 116 U.S. 616 (1886) (holding the Fourth Amendment to preclude civil forfeiture proceedings based on acts of fraud against the Revenue since the proceeding "though technically of a civil proceeding, is in substance and effect a criminal one"); *In re Magnus, Mabee & Raynard, Inc.*, 311 F.2d 12, 16 (2nd Cir. 1962); *United States v. Lipshitz*, 132 F. Supp. 519 (E.D.N.Y. 1955); *Application of Myers*, 202 F. Supp. 12 (E.D. Pa. 1962); *United States v. O'Connor*, 118 F. Supp. 48 (D. Mass. 1953). For that reason, the answer of appellants to appellees' petition sets forth as a separate defense not only that the documents sought were not relevant or material to any authorized investigation but also that there was no probable cause for issuance or enforcement of the summons, preserving the Constitutional issue in the criminal case setting here presented.

reading of the statutes mean that under no circumstances may the court inquire into the underlying reasons for the examination. It is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused. Such an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation. The burden of showing an abuse of the court's process is on the taxpayer, and it is not met by a mere showing, as was made in this case, that the statute of limitations for ordinary deficiencies has run or that the records in question have already been once examined."

See also *Local 174 Etc. v. United States,* 240 F. 2d 387 (9th Cir. 1956); *Martin v. Chandis Securities Co.,* 128 F. 2d 731 (9th Cir. 1942), affirming 33 F. Supp. 478 (S.D. Cal. 1940); *United States v. Carey,* 218 F. Supp. 298, 299, n. 5 (D. Del. 1963).

The particular point that use of a summons in aid of criminal proceedings is not a permissible use under the statute is emphasized in *Reisman v. Caplin,* 375 U.S. 440, 449 (1964), where the Court said:

> "Furthermore, we hold that in any of these procedures before either the district judge or United States Commissioner, *the witness may challenge the summons on any appropriate ground. This would include, as the circuits have held, the defenses that the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution.* Boren v. Tucker, 9 Cir., 239 F.2d 767, 772-773. . . ." (Emphasis supplied.)

The legislative history of Section 7602 lends further support to that strict interpretation, indicating that Section 7602 was enacted to put Internal Revenue Agents "on the

same footing as collectors with respect to the right to issue a summons to determine their primary function, i.e., the correctness of a return or the amount of the tax paid," without in any way providing any right "in Special Agents to use the summons power to seek out evidence of criminal prosecution." See Bender, *The Implications of Reisman v. Caplin in Fraud Cases,* 23rd N.Y.U. Institute on Federal Taxation, 1293, 1295-1296 (1965.)

The showing made by appellees to obtain enforcement of the summons issued by Special Agent Brewer was fatally deficient under the statute and the cases cited, however interpreted, in at least three respects.

A. APPELLEES FAILED TO PROVE THE ALLEGATION OF THE PETITION THAT BREWER'S INVESTIGATION WAS "FOR THE PURPOSE OF ASCERTAINING THE CORRECTNESS" OF APPELLANTS' INCOME TAX RETURNS.

First, there was a total lack of proof—certainly of persuasive proof—that, in the words of the Supreme Court in the *Powell* case, "the investigation [was for] a legitimate purpose." Instead, the testimony of Special Agent Brewer that his duties were "[t]o investigate alleged frauds against the Revenue" tended to confirm that the summons was to serve the illegitimate purpose (*i.e.,* illegitimate in the sense of being unauthorized by the statute) of aiding in the enforcement of criminal statutes.

The truth of the matter—at least *prima facie* in light of the paucity of appellees' case—is best revealed by examination of the appropriate regulation of the Internal Revenue Service describing the duties and limited functions of the Intelligence Division of which Special Agent Brewer is a part, 30 Fed. Reg. 9368 (July 28, 1965), 1966 CCH Stand. Fed Tax Rep. ¶ 5988, which provides as follows:

> "1118.6 Intelligence Division. The Intelligence Division enforces the criminal statutes applicable to income,

estate, gift, employment, and excise tax laws (except those relating to alcohol, tobacco, narcotics, and certain firearms), by developing information concerning alleged criminal violations thereof, evaluating allegations and indications of such violations to determine investigations to be undertaken, investigating suspected criminal violations of such laws, recommending prosecution when warranted, and measuring effectiveness of the investigation and prosecution processes. The Division assists other Intelligence offices in special inquiries, drives, and compliance programs and in the normal enforcement programs, including those combating organized wagering, racketeering, and other illegal activity, by providing investigative resources upon regional or National Office request. It also assists U.S. Attorneys and Regional Counsel in the processing of Intelligence cases, including the preparation for and trial of cases." 1966 CCH Stand. Fed. Tax Rep. ¶ 5988.

It is especially instructive to compare the function of the Intelligence Division as above described with that of the Field Audit Branch of the Audit Division, described as follows:

"1118.44 Field Audit Branch. Conducts field examinations realtive to all types of taxes (except alcohol, tobacco, and firearms) to determine correct liabilities of taxpayers for tax and penalties, including the examination of claims for refund, credit or abatement, or for redemption of stamps. Also conducts field examinations of offers in compromise based on either doubt as to liability or inability to pay, and special field examinations, as requested, including joint examinations with special agents of the Intelligence Division where tax evasion may exist." 1966 CCH Stand. Fed. Tax Rep. ¶ 5988.

It is thus with both legally technical and expariential accuracy that a former Department of Justice official has

emphasized "the great distinction between the Function of an Internal Revenue Agent and a Special Agent"

> "The sole function of a Special Agent in the Intelligence Division of the Internal Revenue Service is to seek evidence of crimes. He has no concern whatsoever with the amount or collection of any additional tax, these being strictly the concern of the revenue agent. He is exactly the same as any other Treasury Agent who may seek evidence of narcotics, counterfeiting, alcohol tax, customs violations, etc. A special agent is a criminal law enforcement officer, just like any state or municipal detective or policeman. He, like any other government agent who enforces the criminal law must obtain a valid search warrant."

Burns, *Searches and Seizures*: *The Suppression of Evidence,* N.Y.U. 20th Inst. on Fed. Tax 1081, 1087 (1962). But see the ruling on the peculiar facts presented in *Tillettson v. Boughner,* 333 F.2d 515 (7th Cir. 1964) (where the Internal Revenue Service sought merely to find out the name of the taxpayer involved and the Regulation describing the function of the Agent involved referred specifically to "the assertion of civil penalties").

In the face of such reality and upon the record presented, then, it misses the point to hold, as the District Court did, that the foregoing may be ignored because a criminal prosecution still may not result from the Special Agent's efforts. That is true, after all, with respect to any investigation made by a Treasury Agent investigating narcotics, counterfeiting or the like or any policeman investigating the occurrence of any crime. Furthermore, a criminal investigation may, and perhaps frequently does, turn up a case of civil liability (*e.g.,* an investigation of illegal sale of alcohol may reveal alcohol tax liability), but that does not make such an investigation any the less one with respect to

criminality for which administrative summonses are not permitted. Where, as here, it appears that the sole function of the person issuing the summons is to determine whether a crime has been committed, with no responsibility or function whatever as to the amount of tax payable by the person under investigation (the ascertainment of some deficiency as a requirement of criminality being his entire concern in that regard*), it cannot justify the summons under the statute that the person under investigation is in fact innocent of that, by inference, civil liability also may be of incidental interest to the investigator. *Cf. United States v. O'Connor,* 118 F.Supp. 248 (D. Mass. 1953), particularly as explained in *Boren v. Tucker,* 239 F.2d 767, 773 (9th Cir. 1956):

> "The Government argued in the O'Connor case that the facts before the court showed that while 'at least one' of the purposes of the Special Agent was to aid the criminal prosecution of the taxpayer, this statement raised the *inference* that there existed other purposes, and that these other purposes might possibly be of direct interest to the Treasury and its Special Agent. The court (and we think properly so in view of the factual situation there existing) refused to consider any undisclosed purposes arising from inference, and held it to be against policy for the Judicial branch of the Government to lend its support to the use of an *unrestricted* administrative subpoena power."

Indeed, the logic and underlying reasoning supporting the foregoing view of the matter would seem irresistibly compelling were it not for the contrary argument which appellees have constructed, and which the court below apparently found persuasive, to substitute for evidence in this case the holdings on the facts presented in some other

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**Herzog v. United States,* 226 F.2d 561 (9th Cir. 1955); *United States v. Schenck,* 126 F.2d 702 (2d Cir. 1942).

cases—in particular, the case of *Boren v. Tucker, supra.* Accordingly, it may be well to consider the significance of the *Boren* decision in the setting of this case.

First, it is not a holding that any investigation by any Internal Revenue Service employee or any Special Agent is to be validated by district courts merely upon request. As this Court noted in its opinion, the trial court "carefully went into the unusual factual situation"—and apparently there was relevant evidence there to consider, not a scanty record bolstered by suggested "inferences". Thus, the instruction of that case, as much as in all the other cases which might be cited dealing with Section 7602 summons, is that, as one court explained, the "one principle in common [to] the divergent authorities" is that "the question of whether an investigation is unnecessary [or, as is challenged in this case, for a legitimate purpose] is one of fact". [*United States v. Carey, supra,* 218 F. Supp. at 301]. If it were otherwise, the decision would have to be read as conflicting with the later decisions of the Supreme Court in the *Powell* and *Reisman v. Caplin* cases—which it is not, having indeed been cited by the Supreme Court (in *Reisman v. Caplin, supra* at 449) for the proposition that it is a sound defense to an enforcement proceeding that "the material is sought for the improper purpose of obtaining evidence for us in a criminal prosecution."

Second, to the extent that the opinion holds to the view expressed by the court below that the possibility that a criminal prosecution may not ensue is sufficient to legitimize a Special Agent's summons, such may be explained by the failure of the parties to fully explain to the Court in that case the sharp distinction in function between a revenue agent and a Special Agent of the Intelligence Division, revealed in this case by the published Regulations.

Third, even if the factual circumstances of the cases were the same, there has in the last ten years been a steady liberalization of the Constitutional protection afforded to those under investigation for the commission of crimes as well as those formally accused. See *Escobedo v. Illinois,* 378 U.S. 478 (1964). Here, as much or more than in the *Escobedo* case, the investigation has focused on appellants and—most clearly—there can not be any reasonable doubt that the sole function, the sole direction, the sole interest and dedication of Special Agent Brewer is to determine whether a crime has been committed and if at all possible to find that it has and to produce and put together the facts to aid in prosecution. That, under a modern view of what is permissible, should not be written off as merely harmless or possibly harmless, preliminary investigatory activity.

B. APPELLEES FAILED TO PROVE THE ALLEGATION OF THE PETITION THAT THE RECORDS SOUGHT "WOULD HAVE A DIRECT RELATION TO THE CORRECTNESS" OF APPELLANTS' RETURNS.

The only evidence offered by appellees as to the allegation of the petition that the records sought "would have a direct relation to the correctness" of appellants' returns was the testimony of Special Agent Brewer that his purpose in examining the records sought was so that he "could reconcile the difference between the loans shown by the bank as having been made to Air Conditioning Supply, and loans as shown on the books of Air Conditioning Supply as having been received from the bank." (R. 11-50.)

Allowing even every inference favorable to appellees with respect to the matter, it seems apparent as a fundamental of income tax law that the purpose and subject matter of the inquiry stated is irrelevant and immaterial to the correctness of appellants' returns: If in fact appellants borrowed more from the Bank than what their own records

show, that circumstance would not add or detract one cent from appellants' income.*

Disallowing any presumption or inference favorable to appellees from the mere fact that Special Agent Brewer asserted relevance in a general conclusionary statement in the petition (which, it may be noted, seemed to be cast in form book language), it is clear that appellees' proof is woefully deficient: Indeed, it seems a more reasonable assumption from the testimony that Special Agent Brewer desired the records referred to not to ascertain the correctness of appellants' returns but instead to ascertain the existence of one possible defense to a charge of criminal evasion.

Thus, here as much as in *Local 174, Etc. v. United States,* 240 F.2d 387, 391 (9th Cir. 1956), it would seem that:

> "The tax officials assumed that all that was required upon their part was to show that they did not have sufficient data to satisfy them of the correctness of the tax returns of the Brewsters . . . and to show that possession of all of the books and documents assumed to be under control of the Local was denied them. This demand was simply that a court place the imprimatur of approval as a rubber stamp upon the administrative subpoena without further investigation. This approval would constitute the administrative enforcement officials the judges of relevance . . ."

Accordingly, it is as meet to declare again and to hold in this case that:

> "The burden is upon the revenue agents in the first instance at such a judicial hearing to show that

*Conceivably the government might be legitimately interested in the amount of interest paid by appellants to the Bank if interest was taken as a deduction in an excessive amount. But it seems evident that the government does not have any interest in that subject and, indeed, it did not bother to prove even that appellants had taken any deduction for any interest payment.

the demand is reasonable under all the circumstances and to prove that the books and records which they demand are relevant or material to the tax liability of the person liable therefor . . ."

"Neither the revenue agent nor the Court has authority under the statute to require the production of memoranda, books, etc., of third parties unless they have a bearing upon the return or returns under investigation.

"In Martin, Internal Revenue Agent v. Chandis Securities Co., D.C. 33 F.Supp. 478, 480, the Court, in discussing § 3614, I.R.C., said:

" 'The agents are not the sole judges as to the scope of the examination.

" 'They must satisfy the Court that what they seek may be actually needed. Otherwise, they would be assuming inquisitorial powers beyond the scope of the statute.' "

". . .

"The affidavits submitted were inadequate to support propositions which the agency was required to prove, such as the materiality and relevancy of any document or item specifically described to the tax liability of either of the [taxpayers]." [240 F.2d at 390, 391.]

C. APPELLEES FAILED TO PROVE THE INFERENTIAL ALLEGATION IN SPECIAL AGENT BREWER'S AFFIDAVIT THAT THE RECORDS SOUGHT WERE REQUIRED BY HIM "IN ORDER TO ASCERTAIN THE CORRECTNESS" OF APPELLANTS' RETURNS.

As noted briefly above, Brewer's testimony in support of the petition indicated that he had somehow obtained a copy of "the bank's central liability control" with respect to loans to appellants in the years in question and that the record obtained indicated the loans made to Air Conditioning Supply Co. Thus, on the face of the record, it would appear that Special Agent Brewer already had in his possession the

basic information he said he desired to obtain; no reason was given or suggested as to why he needed or desired additional confirmation of the records he previously obtained. Accordingly, appellees failed to prove "that the information sought is not already within the Commissioner's possession" as required by *United States v. Powell,* 379 U.S. 48, 57-58 (1964). Indeed, the record, the substance of which is recited above, does not warrant the conclusion of the trial court that "there has been no evidence presented indicating that all the records and information sought belonging to the bank are 'already within the Commissioners' possession' "; to the contrary, appellees' own evidence indicated that the information sought had already been obtained.

Moreover, there does not appear to be any warrant for the inferential holding of the court below that the burden of presenting evidence with respect to what was already in Special Agent Brewer's possession was the burden of appellants. The language of the Supreme Court in the *Powell* case indicating what the Commissioner "must show" would seem to indicate that the court below was wrong as a matter of law in that regard. *Cf. Martin v. Chandis Securities Co.,* 128 F.2d 731, 735 (9th Cir. 1942), emphasizing that "[The Commissioner's] rights, if any, are statutory, and to obtain the relief granted by the statute he must bring himself within the terms thereof."

II. Enforcement of the Summons Issued Upon the Record in This Case Would Pose a Serious Constitutional Issue Under the Fourth and Fifth Amendments.

It deserves separate mention in connection with this appeal that the need to avoid impinging on delicate Constitutional rights provides added reason in this case for refusing to make any special allowance to appellees as

to the proof required to warrant enforcement of the summons. See *Application of Myers,* 202 F.Supp. 212, 213 (E.D. Pa. 1962), where the court (enjoining preliminarily the enforcement of a Section 7602 summons issued by a special agent where an indictment already had been obtained) stated that:

> "We believe that Government's purpose . . . is contrary to our fundamental and deep-seated conceptions of fair play. See United States v. O'Connor, 118 F.Supp. 248 (D.C.Mass. 1953) . . . It should not oppress a defendant who stands accused of a crime and whose liberty is at stake . . . by invoking in aid of a criminal charge the processes which Congress has authorized for the administration of the revenue laws. The court will not permit evasion of the traditional procedure in criminal trials embodied in the Federal Rules of Criminal Procedure by resort to the great administrative powers in aid of the revenue laws which are granted by Section 7602 of the Internal Revenue Code of 1954 (26 U.S.C.A. § 7602)."

and *United States v. O'Connor,* 118 F.Supp. 248, 250-251, where Judge Wyzanski explained that:

> "The Constitution of the United States, the statutes, the traditions of our law, the deep-rooted preferences of our people speak clearly. They recognize the primary and nearly exclusive role of the Grand Jury as the agency of compulsory disclosure.
>
> "* * *
>
> "To encourage the use of administrative subpoenas as a device for compulsory desclosure of testimony to be used in presentments of criminal cases would diminish one of the fundamental guarantees of liberty. Moreover, it would sanction perversion of a statutory power. The power under § 3614 was granted for one purpose, and is now sought to be used in a direction

> entirely uncontemplated by the lawgivers. The limitations implicit in every grant of power are that it will be used not colorably, but conscientiously for the realization of those specific ends contemplated by the donors of the power."

See also the searching opinion of Judge Rayfiel in *United States v. Lipshitz,* 132 F.Supp. 519 (E.D.N.Y. 1955) (suppressing use of evidence obtained by a Revenue Agent at the instance and request and for the use of a special agent in a criminal investigation).

The approval of the result in the *O'Connor* case by this Court in *Boren v. Tucker, supra,* would indicate, in light of the Constitutional rights referred to, the appropriateness of a similar result here.* For, in this case, just as in the *O'Connor* case unlike the situation in *Boren v. Tucker,* the government has elected (insofar as the proof is concerned) in effect to rely on merely an "inference" that Special Agent Brewer was performing some function other than the ordinary function of a policeman (to determine whether or not a crime was committed and to gather evidence for use in criminal prosecution). Indeed, as has been noted above, in view of the Treasury regulation governing Brewer's job function, if any "inference" is appropriate, it is that, just as in the *O'Connor* case and unlike the situation pre-

*The opinion of the Court in the *Boren v. Tucker* case, of course, distinguished the *O'Connor* case as factually inapplicable and, moreover, in support of the holding in favor of the enforcement of the summons there issued, the opinion indicated that the mere possibility of criminal prosecution in the future should not be a bar to investigation utilizing Section 7602. To the extent that the opinion is read to extend beyond the facts of the case, it may be in conflict, then, with the position of appellants stated in Point 1A of the Argument herein. Even if the opinion is so read, however, a different result still seems warranted here in view of the facts of the case, which, as noted in the text, *infra,* appears in context closer to the facts presented in the approved *O'Connor* case.

sented in *Boren v. Tucker,* Special Agent Brewer issued the summons solely in aid of a proposed criminal prosecution so that the District Court below (and this Court as well) has been asked in effect "to lend its support to the use of an *unrestricted* administrative subpoena power" (*Boren v. Tucker,* 239 F.2d at 773).

III. The "Petition" Should Have Been Dismissed as Improper Under the Federal Rules.

The recent decision of the Supreme Court of the United States in *United States v. Powell, supra,* specifically considered the manner in which enforcement of Section 7602 summons should be instituted and the governing procedure, stating as follows (n. 18):

> "Because § 7604(a) contains no provisions specifying the procedure to be followed in invoking the court's jurisdiction, the Federal Rules of Civil Procedure apply, Martin v. Chandis Securities Co., 9 cir., 128 F.2d 731. The proceedings are instituted by filing a complaint followed by answer and hearing. If the taxpayer has contumaciously refused to comply with the administrative summons and the Service fears he may flee the jurisdiction, application for the sanctions available under § 7604(b) might be made simultaneously with the filing of the complaint."

In proceeding by a "petition" and order to show cause obtained ex parte, appellees evidently chose deliberately to flout the quoted pronouncement of the Supreme Court with respect to the matter. That should have been enough in the circumstances presented to call for dismissal of the "petition", requiring appellees to commence the proceedings properly.

Nor should the District Court have deemed it an entirely satisfactory remedy merely to deem the "petition" a com-

plaint. By the ex parte order obtained, appellees, in effect, without a judicial determination focussing on the point, accomplished a suspension of the Federal Rules.* The prejdice to a respondent's trial position in such a setting is fairly obvious. What is of course more important, the impairment effected by such procedure to the administration of justice, in questing for the truth as to the matters in issue, may in circumstances be not inconsiderable.

CONCLUSION

For the foregoing reasons, the decisions below should be reversed and the District Court's order should be vacated.

February 11, 1966.

Respectfully submitted,

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*It is of interest to note in that regard that, in a related enforcement proceeding brought shortly after the case here presented in which petitioners proceeded just as they did here, appellees indeed relied on an implicit suspension of the Federal Rules to argue against allowing appellants to take any depositions or the production of any documents in appellees' possession concerning Special Agent Brewer's job function, insisting that the proceeding be entirely summary in nature.

CERTIFICATE

I certify, that, in connection with the preparation of this brief, I have examined Rules 18 and 19, of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is a full compliance with its rule.

Jack E. Brown